

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GLEN R. BAGLEY

Claimant

VS.

JACK COOPER TRANSPORT COMPANY, INC.

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

Docket No. 169,106

ORDER

ON the 25th day of January, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Robert H. Foerschler on December 9, 1993, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Davy C. Walker, of Kansas City, Kansas. Respondent and Insurance Carrier appeared by their attorney, Stephanie Warmund, of Overland Park, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

ISSUES

- (1) What is the nature and extend of claimant's disability?
- (2) Is claimant entitled to future medical benefits?
- (3) Is claimant entitled to unauthorized medical?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) As a result of a personal injury, by accident which arose out of and in the course of claimant's employment with respondent, Jack Cooper Transport Company, Inc., the claimant has sustained a twenty percent (20%) permanent partial general functional disability.

The claimant, Glen R. Bagley, has been employed by the respondent, Jack Cooper Transport Company, Inc., for over ten (10) years as an over-the-road auto transport carrier driver. On October 23, 1991, the claimant was in the process of unloading his load of cars at an automobile dealership in Sedalia, Pettis County, Missouri, when he injured his low back as he was setting up the aluminum jump skids between the tractor and trailer of his truck. The wind caught one of the jump skids and in an effort to keep the skid from falling on a car parked beside the truck, the claimant held on to the skid, twisting his back. Immediately the claimant felt a sharp pain in the center of his low back.

Upon returning to Kansas City the following day, the claimant reported the accident to the respondent. The respondent provided medical treatment through Business and Industry Health Group in Kansas City, where the claimant first saw Dr. Akin on October 25, 1991. Medical treatment was provided the claimant in the form of pain medications and physical therapy, which included hot moist packs and ultrasound, for approximately a five-week period. The claimant continued to work, however, his symptoms increased as the pain began to extend down to his right buttocks and eventually to his right ankle and foot. He continued under the care of the Business and Industry Health Group and eventually underwent a MRI of the lumbar spine on January 18, 1992. The results of the MRI were negative and he was eventually released from their treatment.

The claimant continued to be symptomatic and returned to Business and Industry Health Group for further treatment and was finally referred to Robert M. Drisko, II, M.D., an orthopedic surgeon, in Prairie Village, Kansas, for examination and treatment on July 14, 1992.

Dr. Drisko performed a complete neurological and orthopedic examination of the claimant and found increased pain with extension of his back and decreased sensation of the first web space of the right foot between the big toe and second toe. The claimant had complaints of intermittent pain but was able to function with considerable discomfort. After reviewing the previous MRI, Dr. Drisko concluded that the MRI reflected mild lateral stenosis. The lateral recess stenosis is a bony problem that is a degenerative or

congenital process that builds up over time. In the opinion of Dr. Drisko, the preexisting condition was not caused by the claimant's accident in October of 1991, but was apparently aggravated by said accident.

Dr. Drisko recommended that the claimant use a back machine, which is a hard, small lumbar roll, that is adjustable. Additionally, he referred the claimant to the spine rehabilitation program at Trinity Lutheran Hospital in Kansas City, Missouri.

The claimant was seen by Dr. Drisko for the second time on August 11, 1992. The claimant was still having intermittent pain and was continuing to participate in the spine rehabilitation program. The claimant was then returned to Dr. Akin at the Business and Industry Health Group. The last time the claimant saw Dr. Akin for treatment was in August of 1992.

At the request of the respondent's attorney, the claimant returned to Dr. Drisko for an examination and a permanent functional disability rating on July 13, 1993. At the time of this examination, the claimant was able to perform his job duties for the respondent as a truck driver with continuing pain. Dr. Drisko performed a physical examination and concluded that based on the AMA Guides, the claimant, as a result of his work-connected injury of October 23, 1993, has an eighteen percent (18%) permanent impairment of the body as a whole. Dr. Drisko went on to state that his opinion was based on the stenosis, pain in both legs and loss of range of motion of his back on extension. The AMA Guides allow eight percent (8%) for the stenosis, which in this case is doubled because of the condition being on both sides for a total of sixteen percent (16%). Additionally, a two percent (2%) is added for loss of range of motion for extension of the back.

On April 9, 1993, at the request of his attorney, claimant was examined by Ronald Zipper, D.O., an osteopathic orthopedic surgeon in North Kansas City, Missouri. He evaluated the claimant in reference to expressing an opinion as to claimant's permanent partial functional impairment. At the time of the examination, the claimant was continuing to perform his same over-the-road trucking job for the respondent. He was complaining of low back pain that radiated into his right buttocks, right posterior thigh and down into his right ankle. Complaints of numbness and tingling continued into his toes of his right foot. He had further increased pain when bending, coughing, and sneezing.

Dr. Zipper's physical examination of the claimant revealed the following positive findings:

- (a) Mild antalgic gait favoring the right lower extremity.
- (b) Straight leg raises were positive on repeated attempts in both the seated and supine positions at seventy-five degrees (75°).
- (c) Paravertebral muscle spasms from L-4 to S-1 which indicates claimant having continuing pain in this area.
- (d) Definite big toe weakness on the right after repeated testing indicating a neurological deficit.
- (e) Pinwheel examination for sensory deficit revealed increased sensation on a consistent basis on the right L-5 and S-1 dermatomes. This finding is consistent with a neurological deficit.

Dr. Zipper, in addition to examining the claimant, had available for his review medical records of Dr. Robert M. Drisko, II, Business and Industry Health Group, Trinity

Lutheran Hospital and a MRI report dated January 18, 1992 from Richard P. Trevor, M.D. of Research Radiologic Group.

Based on claimant's history, physical examination, and the medical reports provided, Dr. Zipper's impression in reference to the claimant's diagnosis was that the claimant had a herniated disk at L4-L5, with radiculopathy to the right lower extremity. It was Dr. Zipper's opinion that such condition had been persistent and progressive since the date of the claimant's injury. Dr. Zipper made the forgoing diagnosis of a herniated disk even though the MRI report of the radiologist was negative. With respect to restrictions, Dr. Zipper concluded that the claimant should avoid bending at the waist; no prolonged sitting; no driving a truck or car more than one hour at a time; no lifting greater than 10 pounds; and, the claimant should wear a lumbar corset if he continues to work at his current physical level.

Concerning the claimant's permanent functional rating, Dr. Zipper, utilizing the AMA Guides, Third Edition, Revised, along with his experience of seventeen years concerning 100,000 patients, and his experience in orthopedics concerning low back injuries, was of the opinion that as a result of the claimant's job-related accident of October 23, 1991, the claimant suffered a twenty-eight percent (28%) permanent functional impairment of the body as a whole.

It is the respondent's position in this case, that Dr. Robert M. Drisko, II's functional impairment rating of eighteen percent (18%) is too high as Dr. Drisko erred when he doubled the AMA Guides eight percent (8%) rating for stenosis. The correct functional impairment rating should be the eight percent (8%) reflected in the AMA Guides for stenosis plus a two percent (2%) for loss of extension which would amount to a total of a ten percent (10%) permanent impairment functional rating.

The claimant asserts that Dr. Zipper's twenty-eight percent (28%) permanent functional impairment rating is more persuasive and credible because Dr. Zipper concluded that the claimant because of his work-related injuries was currently a surgical candidate.

By comparing both Dr. Drisko's and Dr. Zipper's functional impairment ratings, the Administrative Law Judge found that the claimant's accident of October 23, 1991, aggravated his preexisting condition of bilateral stenosis resulting in a permanent partial general functional disability in the amount of twenty percent (20%).

K.S.A. 44-551(b)(1) gives the Appeals Board the authority to grant or refuse compensation, or to increase or diminish any award of compensation made by the Administrative Law Judge. However, after reviewing the whole evidentiary record in this case, the Appeals Board finds and concludes that the Award of Administrative Law Judge Robert H. Foerschler dated December 9, 1993, awarding the claimant twenty percent (20%) permanent partial general functional disability should be affirmed in all respects.

(2) The claimant is entitled to future medical treatment only upon proper application to and approval by the Director of Workers Compensation.

Dr. Drisko did not recommend surgery at the present time, but indicated that surgery at some point in the future was possible because of the claimant's continuing back and leg pain. It was the testimony of Dr. Zipper that the claimant was a surgical candidate for

laminectomy and a discectomy and possible partial facetectomy, if lateral recess stenosis was found consistent with Dr. Drisko's previous interpretation.

(3) The Appeals Board further adopts and incorporates herein the findings of Administrative Law Judge Robert H. Foerschler as set forth in his Award dated December 9, 1993, to the extent that they are not inconsistent with the findings and conclusions expressed in this Order.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler, dated December 9, 1993, is affirmed in all respects and an Award of compensation is hereby entered in favor of the claimant, Glen R. Bagley, and against the respondent, Jack Cooper Transport Company, Inc., and its insurance carrier, Liberty Mutual Insurance Company.

The claimant is entitled to .43 weeks of temporary total disability at the rate of \$289.00 per week or \$124.27 followed by 414.57 weeks at \$134.31 per week or \$55,722.35 for a twenty percent (20%) permanent partial general body disability making a total award of \$55,846.62. As of March 1, 1994, there would be due and owing to the claimant .43 weeks of temporary total compensation at \$289.00 per week in the sum of \$124.27 plus 122.57 weeks permanent partial compensation at \$134.41 per week in the sum of \$16,474.63 for a total due and owing of \$16,598.90 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of \$39,247.72 shall be paid at \$134.41 per week for 292 weeks or until further order of the Director.

The claimant's contract of employment with his counsel is approved subject to the provisions of K.S.A. 44-536.

Future medical is awarded upon proper application to the Director.

Unauthorized medical expense, if any, is awarded paid up to the \$350.00 stated maximum allowance upon proper presentation of said expense to the respondent.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against respondent and its insurance carrier to be paid direct as follows:

Metropolitan Court Reporters, Inc. Transcript of Regular Hearing June 30, 1993	\$174.00
Rebecca J. Ramsey, RPR Deposition of Robert M. Drisko, M.D.	\$119.20
Eugene Dolginoff & Associates Deposition of Ronald Zipper, D.O.	\$241.00

IT IS SO ORDERED.

Dated this _____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Davy C. Walker, 330 Brotherhood Bldg., 753 State Av., Kansas City, Ks 66101
Stephanie Warmund, 10561 Barkley, Suite 410, Overland Park, KS 66212
Robert H. Foerschler, Administrative Law Judge
George Gomez, Director